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IN THE

[redacted] Court of the United States

[redacted]

v.

No. [redacted]

[redacted]

BRIEF FOR [redacted]

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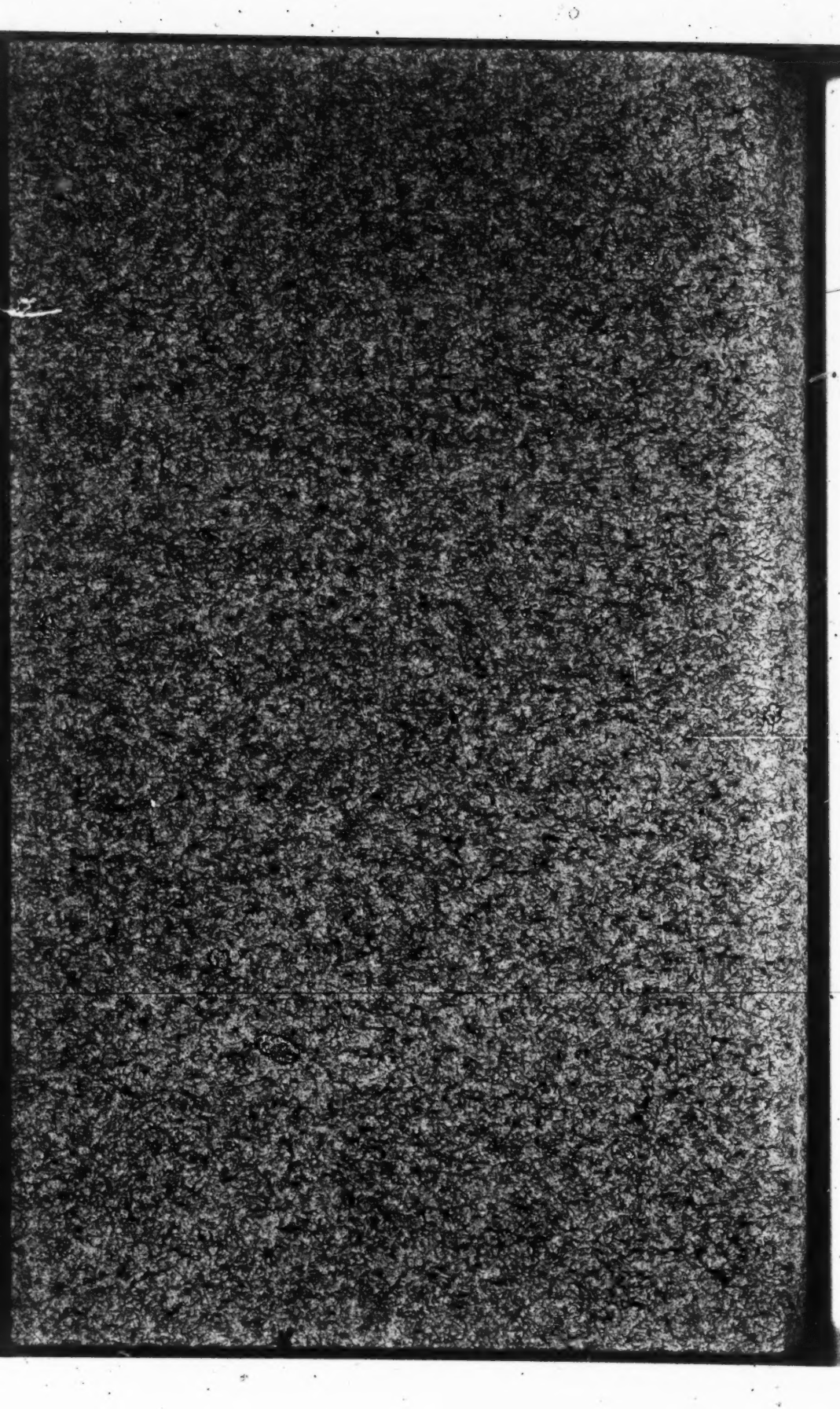

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IN THE

Supreme Court of the United States

W. B. WORTHEN COMPANY, AGENT, GEORGE G. WORTHEN AND MOLLIE P. WORTHEN ..... *Appellants,*

v. No. .....

MRS. W. D. THOMAS ..... *Appellee.*

BRIEF FOR APPELLEE

STATEMENT

The facts in the case at bar have been fully stated in detail by appellants and are not disputed. Appellants admit that the act in question, Act 102, enacted by the General Assembly of Arkansas in its 1933 session approved March 16, 1933, is not unconstitutional prospectively, but allege that this act is unconstitutional when applied retrospectively.

It is first contended by appellants that Act 102 is unconstitutional because it impairs the obligation of a contract, and second because it takes property without due process of law.

BRIEF AND ARGUMENT

Act 102 of the Acts of Arkansas of 1933 does not impair the obligation of a contract.

At the time that the act in question, Act 102, was passed by the General Assembly of the State of Arkansas and approved by the Governor of the State of Arkansas, there was no contract existing between the appellant, W. B. Worthen Company, Agent, and Mrs. W. D. Thomas, appellee. Appellant did have a judgment against the appellee, Mrs. W. D. Thomas.

An implied rental contract which was the basis of the judgment secured against appellee by appellants is superseded and extinguished by and merged into the judgment entered thereon.

Pike v. *McDonald*, 32 Md. 418, 54 Am. Dec. 597.

Napier v. *Gidiere*, 40 Am. Dec. 613.

Wann v. *McNulty*, 7 Ill. 355, 43 Am. Dec. 58.

Newman v. *Erwin*, 44 La. Ann. 1114.

Whatever the previous cause of action may have been it is merged in the judgment.

Goodrich v. *Dunbar*, 17 Barb. 644.

Nicholl v. *Mason*, 21 Wend. 341.

Seylam v. *Barber*, 18 N. Y. 468, 75 Am. Dec. 254.

A judgment is not such a contract as the Federal Constitution was intended to protect against legislation tending to impair obligations.

Evans-Snyder-Buell Company v. *McFadden*, 105 Federal 293, 44 C. C. A. 494, 58 L. R. A. 900.

In *Evans-Snyder-Buell Company* v. *McFadden*, *supra*, Justice Thayer, speaking for the court, said:

"No contract is disclosed by the record which the Act of Congress in question operates to impair. It is true that the attaching creditors have a judgment against J. R. Blocker, and that judgments are sometimes termed contracts of record, but such general statements mean only that the law will imply a promise on the part of a judgment debtor to pay a judgment that has been recovered against him, and that he may be sued in form *ex contractu* on such implied promise. A contract of that nature, however, which does not rest on the mutual assent of the parties thereto, but is forced upon the judgment debtor as a result of the legal implication, *is not such a contract as the Federal Constitution was intended to protect against legislation tending to impair its obligation.* This proposition is well established by controlling authority."

Citing *Louisiana ex rel Folsom* v. *New Orleans*, 109 U. S. 285.

Garrison v. *New York*, 22 Law Ed. 612-14.

In *Morley* v. *Lake Shore and M. S. Railway Company*, 146 U. S. 162, this court held that:

"A judgment is in no sense a contract or agreement between the parties."

Citing *Wyman* v. *Mitchell*, 1 Cow. 316-21.

In *Read* v. *Mississippi County*, 69 Ark. 365, the court held that a judgment is not a contract.

Act 102 does not impair the obligation of any contract between the parties for the reason that it is a remedial statute; and only governs the issuance of garnishment in certain cases. In the case at bar the fund in question was not in existence at the time Mrs. W. D. Thomas entered into an implied rental contract with the appellant, W. B. Worthen Company, Agent.

Justice Kirby, who wrote the opinion in this case, had this to say:

> "* * * was not enacted for the purpose of allowing beneficiaries exemptions which they are not entitled to under the constitution and laws of this State, but the act was passed for the purpose of exempting these funds from the operation of our general statutes, regulating issuance of garnishments and proceedings thereunder."

In the recent case of *Home Building and Loan Association* v. *Blaisdell*, 54 Supreme Court Reporter, page 231, Chief Justice Hughes quoted *Sterges* v. *Crowinshield*, 4 Wheat. 200, 4 Law Edition 529. Chief Justice Marshall pointed out the distinction between the obligation and remedy, and said:

> "The distinction between the obligation of a contract and the remedy given by the Legislature to enforce that obligation has been taken at the bar and exists in the nature of things. Without impairing the

obligation of a contract, the remedy may certainly be modified as the wisdom of the nation may direct."

We concede that if the Legislature of the State of Arkansas had sought to take away every remedy for the enforcement of the judgment in question here, that this act, Act 102, would be unconstitutional. However, the Supreme Court of Arkansas has construed Act 102 to only affect the remedy of garnishment in certain cases. The Legislature of Arkansas created the writ of garnishment, there being no such writ at common law.

Mr. Sutherland in his work on St. Constr., Section 482, said:

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. A remedy may be provided for existing rights and new remedies may be added or substituted for those which exist. Every case must to a considerable extent depend upon its own circumstances. General words and remedial statutes may be applied to past transactions in the pending cases, according to all indications of legislative intent, and this may be greatly influenced by consideration of convenience and reasonableness and justice."

Judge Cooley in his work on Constitutional Limitations at page 346, said:

"Such being the obligation of a contract, it is obvious that the rights of parties in respect to it are liable to be affected in many ways, by changes in the laws, which it could not have been the intention of the con-

stitutional provision to preclude. There are few laws which concern the general policy of a State, or the government of its citizens in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form. Creditors as well as debtors are presumed to know that the Legislature has an inherent power to enlarge, limit, alter or repeal remedial statutes, provided that contracts are not directly impaired, and a remedy be left, though less convenient and less prompt and speedy, than the one so changed or repealed. Also to enact such laws as, 'according to its own views of policy and humanity, it may deem necessary to protect the citizens of the State from unjust, merciless, and oppressive litigation and other evils detrimental to the common weal, and protect them in those pursuits of industry, and secure to them those privileges and rights, which experience has already shown, or in the future may be shown, to be necessary to the prosperity and strength of the State, although such necessary laws may in some way or other affect contracts previously entered into'."

In *Home Building and Loan Association* v. *Blaisdell*, *supra*, Chief Justice Hughes said:

"Not only are existing laws read into contracts an order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a govern-

ment by virtue of which contractual relations are worthwhile. A government which retains adequate authority to secure the peace and good order of system. This principle of harmonizing the constitutional prohibition with the necessary *residium* of State power has had progressive recognition in the decisions of this court."

The case of *Evans-Snyder-Buell Company* v. *McFadden, supra,* approved by this court in 185 U. S. 505, is squarely in point with the case at bar. Justice Thayer delivered the opinion of the court and said:

"Considered as an original proposition, the weight of reason, as well as the authorities on kindred questions, sustain the view that an attachment lien—at least until a final judgment is rendered in the case—may be impaired, displaced, or destroyed by legislative enactments which are designed to have that effect, and that attaching creditors have no just ground to complain of such legislation. A writ of attachment is nothing more than a remedy afforded by law for the collection of a debt. It is like a *capias ad respondendum,* and a remedy of that nature may be abolished at any time by the Legislature which created it. The same proposition holds good with respect to all laws, which merely provide remedies for the enforcement of rights or the redress of grievances. They may be modified or repealed without reference to the effect of such legislation on pending actions, the only limitation on the power of the Legislature in this respect being that an adequate remedy must remain or be provided for the

enforcement of such existing rights as have their origin in private contracts. In actions *ex contractu* litigants are not entitled to insist that they shall be afforded the same remedies or be privileged to plead all of the defenses that were available when the contract was made, or that have accrued subsequently under existing laws; the rule being that remedies, and those rights pertaining to the remedy which are purely of statutory creation may be altered or abolished, even after an action is instituted, provided an adequate remedy remains for rights founded on contract and that some defenses, such as those existing under usury laws and those that have accrued under statutes of limitation, may be withdrawn, and rendered of no avail."

SECOND. THE CONSTRUCTION PLACED ON ACT 102 BY THE SUPREME COURT OF ARKANSAS DOES NOT OPERATE TO TAKE PROPERTY WITHOUT DUE PROCESS OF LAW.

It is argued that Act 102 as construed by the Supreme Court of Arkansas deprives this appellant of a vested right without due process of law. We do not think that this proposition was raised properly or that this matter is properly before this court. Appellants did not raise this issue in the Pulaski Circuit Court, and under the decisions of the Supreme Court of Arkansas, this matter could not have been passed on by the Supreme Court of Arkansas.

Leonard v. *Luther*, 185 Ark. 572.

Gibbes v. *Zimmerman, et al*, 54 Supreme Court Reporter, page 140.

We do not feel, however, that there is any merit in the contention of appellants that Act 102 operates to take property without due process of law, even should this court rule that this matter is properly before it. There is nothing in the Federal or State constitution which prohibits the Legislature of Arkansas from passing retrospective laws.

Green v. *Abraham*, 43 Ark. 420.

Appellants have no property right or vested interest in any form of procedure or in the remedy of garnishment. This proposition was also passed on in the case of *Evans-Snyder-Buell Company* v. *McFadden*. In this case it was held:

> "A legislative body like the Congress of the United States, which is not prohibited from passing retrospective or retroactive laws, *has an undoubted power to divest or impair an attachment lien*—at least until there has been an adjudication that adequate grounds for the attachment exist, and that the lien of attachment be enforced. The power of Congress to deal with a remedy which it has provided for the collection of a debt does not cease as respects a suitor who has simply taken the initial steps to avail himself of the remedy, but whose rights have not been finally adjudicated. The power in question continues, in any event, until such time as, by making use of the remedy, the suitor has acquired a title to or an interest in specific property which the parties to the action are no longer privileged to deny. It is only at such period that his rights can be said to have become vested. Prior thereto they are merely conditional or inchoate."

Judge Thayer had this further to say:

"Considered as an original proposition, the weight of reason, as well as the authorities on kindred questions, sustains the view that an attachment lien, at least until a final judgment is rendered on the case, may be impaired, displaced or destroyed by legislative enactments which are designed to have that effect, and that attaching creditors have no just grounds to complaint of such legislation."

There is another reason why this case should not be reversed. Act 102 of the Acts of Arkansas of 1933 specifically provides in Section 2 that:

"All laws and parts of laws in conflict herewith are hereby repealed, provided, however, that nothing in this act shall be construed to repeal, modify or alter the provisions of Act 76 and Act 141 of the Acts of the General Assembly of 1931."

Act 141 of the Acts of Arkansas of 1931 was approved March 30, 1931, and went into effect ninety days thereafter. This act is as follows:

"Section 1. That Section 5579 of Crawford & Moses' Digest of the Statutes of Arkansas be amended to read as follows:

" 'Section 5579. It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his

natural life; and, in case of her surviving her husband, the sums or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her and for her use; and, in case of the death of the wife before the decease of her husband, the amount of said insurance may be made payable to his or her children, for their use, and to their guardian for them, if they shall be under age, as shall be provided in the policy of insurance; and all proceeds and avails of such insurance shall be free from the claims of the representatives of the husband, or of any of his creditors, whether or not the right to change the beneficiary is reserved or permitted; provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid out of the funds or property of the husband with intent to defraud creditors, with interest thereon, shall enure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless before such payment the company shall have written notice, by or in behalf of a creditor of a claim to recover for premiums paid with intent to defraud creditors, with specifications of the amount claimed, provided, this act shall not apply to pending suits'."

The implied rental contract which is the basis of appellants' claim against the appellee was entered into on the 17th day of November, 1931, which was several months after Act 141, *supra*, went into effect. Act 141 of the Acts

of Arkansas of 1931 was copied after and is the same act as Chapter 80 of the Laws of New York of 1840. The New York Supreme Court in the case of *Baron* v. *Brummer*, 3 N. E. 474, interpreted Chapter 80 of New York Laws of 1840, as follows:

> "That Chapter 80 exempts the proceeds from insurance policies on a husband's life for the benefit of his wife from the claims of any of his creditors, except where the amount of premium paid exceeds a certain sum per annum. * * * Under these various provisions, it was the intention of the Legislature, as settled and determined by the courts in the cases already cited that such policies should not be subjected to the lien of creditors, either of the husband or wife—as to the former by the express words of the statute, and as to the latter by the determination of the courts."

Inasmuch as Act 141 of the Acts of Arkansas of 1931 is copied after and is the same act as Chapter 80 of New York Laws of 1840, the doctrine of borrowed interpretation applies and Act 141, *supra*, will be and should be interpreted the same as the act after which it was copied.

Cathcart v. *Robinson*, 5 Peters (U. S.) 264.

We respectfully submit that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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